Filed 4/29/19 Bootleggers2 v. City of Lancaster CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BOOTLEGGERS2, a California General Partnership, Plaintiff and Appellant, v. CITY OF LANCASTER et al., Defendants and Respondents.	B289315 (Los Angeles County Super. Ct. No. BS169660)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

Susan Barilich for Plaintiff and Appellant.

Stradling Yocca Carlson & Rauth, Allison E. Burns, David C. Palmer, and Sean D. Willet for Defendants and Respondents.

INTRODUCTION

Defendants City of Lancaster and Lancaster City Council issued a conditional use permit (CUP) to HRES Lancaster, LLC, granting HRES the right to construct and operate a Circle K gas station, carwash, and mini-mart, which would sell beer and wine, at a location in Lancaster. Petitioner Bootleggers2, a California general partnership that owns a liquor store near the proposed Circle K location, filed a petition for writ of mandate seeking to set aside the CUP. The petition alleged respondents failed to comply with the Government Code, Lancaster Municipal Code, and the California Environmental Quality Act (CEQA). Although it alleged HRES was an interested party for the CEQA cause of action, HRES was not named in the petition nor was it served with a summons on the petition. The trial court dismissed the petition because, among other reasons, petitioner failed to join HRES, which the court found was a necessary and indispensable party, and joinder was no longer possible due to the running of the statute of limitations. On appeal, petitioner argues that the court abused its discretion in finding HRES indispensable. We affirm.[1]

FACTS AND PROCEDURAL BACKGROUND

On September 21, 2016, HRES applied to the city for a CUP to build a Circle K gas station, car wash, and mini-mart selling wine, beer, and sundries. Because the proposed Circle K was to be constructed within 500 feet of two primary alcoholic beverage establishments and 300 feet of a residential area, the municipal code required HRES to obtain a CUP before HRES

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[1] We observe the trial court dismissed this petition for several reasons. We only address the failure to join an indispensable party, which we find dispositive.

moved forward with building plans. Under the municipal code, the city's planning commission may waive the distance requirements for an alcoholic beverage establishment if the establishment would serve a specific community need and would not adversely affect adjacent properties, uses, or residents.

Disagreeing with its own staff recommendations, in March 2017, the city's planning commission denied the CUP. The planning commission concluded there was no specific community need for another alcoholic beverage establishment. HRES appealed the decision. On May 9, 2017, the city, acting through its city council, considered the appeal, found that a local business park and motorists would derive benefit from the Circle K, and reversed the planning commission's decision. The city granted waivers of the distance restrictions and approved the CUP.[2]

Petitioner owns and operates one of the primary alcoholic beverage establishments within 500 feet of the proposed Circle K. On May 25, 2017, petitioner filed with the trial court a verified petition for writ of mandate, seeking to set aside the May 9, 2017 approval of the CUP, and requesting a temporary restraining order and injunctive relief. Petitioner alleged that, in granting

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[2] We grant the city's November 19, 2018 motion for judicial notice of the Certified Copy of the Notice of Determination file-stamped by Los Angeles County Clerk. (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1090 ["Courts can take judicial notice of the existence, content and authenticity of public records and other specified documents . . ."]; Evid. Code, §§ 459, 452, subd. (h).) We observe that this document appears in appellant's appendix at page 1311, without the stamp indicating its filing with the county clerk. We see no prejudice in taking judicial notice of the file-stamped copy that acknowledges the document's recordation.

the CUP, the city failed to comply with various Government Code and municipal code provisions, and CEQA. Petitioner named the city and its city council as defendants (hereinafter, the city). The caption of the petition named no real parties in interest.

On the second page, the petition alleged: "The Real Party In Interest for the purpose of the CEQA claims is HRES Lancaster, LLC, a Florida limited liability company. HRES Lancaster, LLC can be given notice of this as required by law through its representative Lori Gafner, P.O. Box 1006, Ft. Collins, CO 80522 or its manager and agent for service Victory Asset Management, LLC 5100 W. Kennedy Blvd. #100, Tampa, FL 33609." The petition did not allege a real party in interest for the claims based on the Government Code and municipal code violations. On June 1, 2017, petitioner mailed "a courtesy copy" of the petition to HRES. Petitioner filed the proof of service for this copy about eight months later. The record does not reflect HRES was served with a summons on the petition for writ of mandate.

The trial court heard the request for a temporary restraining order on June 1, 2017, and the request for preliminary injunctive relief on September 14, 2017. The court denied both requests. The city then filed a motion for judgment on the pleadings, which the court granted with leave to amend.

On December 26, 2017, petitioner filed an amended petition for writ of mandate. This amended petition mirrored the original petition's caption and the paragraph describing HRES as a real party in interest for the CEQA claims. No additional allegations were made about the real party in interest in the amended petition. The city answered on January 3, 2018. Two weeks later, petitioner filed a proof of service reflecting delivery on

January 11, 2018 of the amended petition on HRES. Nothing in the record indicates that a summons on the amended petition was served on HRES.

Petitioner and the city filed briefs, and offered exhibits. On February 15, 2018, the court conducted trial on the petition. On March 19, the trial court denied a writ of mandate. In a thorough 24-page final statement of decision, the court ruled: (1) the petition was dismissed because petitioner failed to join a necessary and indispensable party—HRES, (2) alternatively, the petition was denied because petitioner lacked standing to pursue CEQA claims, and (3) also alternatively, the petition was denied because the city's findings, which supported issuance of the CUP, were supported by substantial evidence. The court entered judgment against petitioner.

DISCUSSION

Petitioner contends the court erred in denying the petition and contests on appeal each of the court's grounds. We conclude the trial court correctly ruled that HRES was an indispensable party, and we affirm the dismissal on that ground.

We review the court's determination of an indispensable party for abuse of discretion. (*Kaczorowski v. Mendocino County Bd. of Supervisors* (2001) 88 Cal.App.4th 564, 568.) "Whether a party qualifies as indispensable is ordinarily treated as a matter where the trial court has a large measure of discretion in weighing factors of practical realities and other considerations. [Citation.] Accordingly, the trial court's determination that [a person] was an indispensable party will be reversed only if it amounts to an abuse of discretion." (*Ibid.*)

For reasons we explain below, the court did not abuse its discretion in determining that HRES was both a necessary and an indispensable party.

1. HRES Was Not Joined as a Party

Although petitioner alleged in the body of the petition that HRES was a real party in interest for the CEQA claims, HRES was not identified as a real party of interest in the caption or alleged to be an interested party for the Government Code and municipal code allegations. Petitioner also failed to serve HRES with the petition and a summons as required by law. Sending HRES a "courtesy copy" without a summons was insufficient. (Super. Ct. L.A. County, Local Rules, rule 3.231(b) [petitioner must serve the petition for writ on the real party in interest in the manner of serving a summons and complaint]; Code of Civil Proc., §§ 412.20, 413.10, 1107; *Board of Supervisors v. Superior Court* (1994) 23 Cal.App.4th 830, 839 ["for the purposes of obtaining personal jurisdiction and consistent with constitutional due process, service of a petition for an administrative writ of mandate must be in the same manner required for any civil action"]; *Sonoma County Nuclear Free Zone '86 v. Superior Court* (1987) 189 Cal.App.3d 167, 173 (*Sonoma*) ["A petition for writ of mandate must name the real party in interest, who thereafter has a right to notice and to be heard before a trial or appellate court issues a peremptory writ."].)

Public Resources Code section 21167.6.5, subdivision (a), part of CEQA, also requires that the petitioner "shall name, as a real party in interest, the person or persons identified by the public agency in its notice filed pursuant to subdivision (a) or (b) of Section 21108 or Section 21152 . . . , and shall serve the petition or complaint on that real party in interest, by personal

service, mail, facsimile, or any other method permitted by law, not later than 20 business days following service of the petition or complaint on the public agency."[3] Despite this statutory mandate petitioner did not name HRES (the party identified in the city's notice granting the CUP) in the caption or serve HRES. By law, HRES was not joined in the action.

2. HRES Was a Necessary Party

Our first inquiry into HRES's status in this litigation is whether it was a "necessary party."

Code of Civil Procedure section 389, subdivision (a) requires that a person be joined as a party "if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

"In a CEQA action like the one before us, Public Resources Code section 21167.6.5 provides that 'any recipient of an approval that is the subject of [the] action' must be named as a real party in interest. (§ 21167.6.5, subd. (a).) Thus, section 21167.6.5(a) makes any such recipient a necessary party in a CEQA action,

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[3] Section 21167.6.5 is part of Division 13 of the Public Resources Code. The division is known as the California Environmental Quality Act. (Pub. Resources Code, § 21050.) All subsequent references to Public Resources Code section 21167.6.5 will be abbreviated to section 21167.6.5.

just as those persons described in subdivision (a) of Code of Civil Procedure section 389 are necessary parties." (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 848.)

Here, petitioner sought a writ of mandate to set aside the CUP granting HRES the ability to develop real property. If successful, the writ would have divested HRES of its right to develop the property with a Circle K. HRES, the party who requested, and was granted, the CUP, had a significant and cognizable interest in the outcome of this petition. Petitioner's failure to join HRES impeded HRES's ability to protect its interest in the real property, within the meaning of Code of Civil Procedure section 389. We conclude HRES was a necessary party.

3. HRES Was an Indispensable Party

"If a person [or entity] is determined to qualify as a 'necessary' party under one of the standards outlined above [under Code of Civil Procedure section 389, subd. (a)], courts then determine if the party is also 'indispensable.' " (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 83–84 (*City of San Diego*).)

By statute, the trial court "shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be

adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (Code Civ. Proc., § 389, subd. (b).)

The subdivision (b) factors "are not arranged in a hierarchical order." (*County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1149.) No single factor is dispositive, and the court's consideration of the factors is fact-dependent. (*City of San Diego, supra,* 186 Cal.App.4th at p. 84.) " 'Whether a party is necessary and/or indispensable is a matter of trial court discretion in which the court weighs "factors of practical realities and other considerations." ' " (*Ibid.*)

"Indispensable parties have been identified as those who are essential for 'a complete determination of the controversy' [citations] or the ability of a court to enter 'any effective judgment' [citation]." (*Kaczorowski v. Mendocino County Bd. of Supervisors, supra,* 88 Cal.App.4th at p. 568.) " '[A] person is an indispensable party [only] when the judgment to be rendered necessarily must affect his rights.' " (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 808.) Put another way, "[t]he controlling test for determining whether a person is an indispensable party is, 'Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party. [Citation.]' " (*Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 692 (*Save Our Bay*).)

Here, the trial court analyzed the four statutory factors as follows: "The first factor weighs heavily in favor of dismissal. As discussed, Petitioner seeks to set aside the CUP granted in favor of HRES's project. A judgment for Petitioner rendered in HRES's

absence would prejudice HRES's interests in the CUP. (*Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 501-502 [developer of project indispensable, and dismissal appropriate].) [¶] The second and third factors also weigh for dismissal. Should Petitioner prevail on its claims against the CUP, the court would issue a writ commanding City to set aside the CUP. ([Code of Civil Proc.,] § 1094.5(f).) The court cannot fashion the writ to avoid prejudice to HRES. Absent HRES, a judgment would be inadequate because HRES could collaterally attack it. (*Sierra Club, supra,* 95 Cal.App.3d at p. 502.) [¶] Finally, while Petitioner may not have an adequate remedy if the action is dismissed for nonjoinder, Petitioner should have been aware that HRES was the project applicant at the time of the administrative proceedings. Thus, this factor does not outweigh the other factors, which all support dismissal."

The appellate court came to a similar conclusion on the facts before it in *Save Our Bay*, where an environmental organization challenged a governmental agency's adherence to CEQA in a project to develop private land into a marina. There, the petitioner failed to join the landowner to the action, and the trial court granted summary judgment in favor of the government based on the absence of an indispensable party and the running of the statute of limitations. (*Save Our Bay, supra,* 42 Cal.App.4th at p. 689.) The Court of Appeal affirmed, holding that the landowner was an indispensable party that was required to be joined under Code of Civil Procedure section 389 since its interests were not represented in the litigation, and those interests could be injured by the judgment. (*Id.* at p. 698.) The court explained that the fact the petitioner had no remedy following summary judgment is "an unavoidable result in any

case where an indispensable party is not joined and the limitations period has run." (*Id.* at p. 699.)

Likewise here, the sum of the Code of Civil Procedure section 389, subdivision (b) factors reasonably supports the trial court's conclusion that HRES was indispensable to the present action. We find no abuse of discretion.

4. Petitioner's Arguments are Unpersuasive

Petitioner asks us to distinguish his CEQA claims from the other claims in his petition. He asserts that "[a]n application for a writ of mandate to . . . set aside . . . a CUP, based on the lack of substantial evidence to support it does not require the joinder of the Real Party in Interest." For support, petitioner cites *Leonard Corp. v. San Diego* (1962) 210 Cal.App.2d 547 (*Leonard*). But *Leonard* does not advance this proposition. The *Leonard* court found that in an action to determine the validity of a zoning ordinance for a particular subdivision, property owners of neighboring subdivisions were not indispensable parties. (*Id.* at p. 550.) *Leonard* simply cautions that not all necessary parties are indispensable. (*Ibid.*)[4]

The Court of Appeal addressed petitioner's argument under similar circumstances in *Templeton Action Committee v. County of San Luis Obispo* (2014) 228 Cal.App.4th 427 (*Templeton*). There, an association petitioned for writ of mandate challenging a county's approval of an application for a tentative subdivision map and conditional use permit. Much like the present case, the association sued the county that issued the CUP, but did not join

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[4] *Leonard* interpreted the former version of Code of Civil Procedure section 389 which used "conditionally necessary" parties to describe those persons as to whom the court had discretion to allow intervention. (210 Cal.App.2d at pp. 550-551.)

the developer that was awarded the CUP. The *Templeton* trial court granted the county's demurrer based on the association's failure to join a necessary or indispensable party. (*Id*. at pp. 429-430.) On appeal, the association argued that "because the decision of the County is the only action being attacked, only the County is an indispensable party." (*Id.* at p. 431.) The Court of Appeal disagreed, concluding that "when a plaintiff seeks affirmative relief that would injure or affect a third person's interest, the third person is an indispensable party. [Citation.] When a plaintiff seeks to set aside a developer's permit, it is obvious that such relief directly affects and can injure the developer's interests. [Citation.] [The developer was] an indispensable party that must be served." (*Ibid*.) CEQA is not mentioned in the appellate court's opinion. We conclude that *Templeton* supports the trial court's decision here.[5]

Next, petitioner argues that as a mere developer and not the owner of the property, HRES has no vested or legal interest in this action. As noted above, in CEQA cases, the recipient of an approval that is the subject of the action must by statute be named as a real party of interest and is a necessary party. (§ 21167.6.5, subd. (a); *Quantification Settlement Agreement Cases, supra,* 201 Cal.App.4th at p. 848.) Ownership is not essential for the party to be necessary and indispensable. "When a plaintiff seeks to set aside a developer's permit, it is obvious

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[5] At oral argument, petitioner argued that *Templeton* did not apply because HRES is not a developer. The record does not support their assertions: HRES identified itself as the developer at the City of Lancaster Planning Commission and city council meetings in March and May 2017.

that such relief directly affects and can injure the developer's interests." (*Templeton, supra,* 228 Cal.App.4th at p. 431.)

Citing *Sonoma, supra,* 189 Cal.App.3d at page 173, petitioner also contends its non-joinder of HRES is immaterial because the city adopted the CUP and has the authority to rescind it. *Sonoma* does not discuss rescission of city council action. Indeed, it is an election case and does not mention "rescind" or "rescission." Moreover, Lancaster's theoretical ability to rescind the CUP has no bearing on whether HRES's interests would have been prejudiced if petitioner were successful on its mandate claim. There is no assurance that the city would rescind anything. HRES has a CUP that gives it the right to develop a Circle K on the property. Petitioner cannot preclude HRES from protecting its interest by excluding it from the litigation.

Petitioner further argues that HRES's interests are "consequential and economic" and not the type of "legal interest" that compels joinder, citing *Peabody Seating Co. v. Superior Court of Los Angeles* (1962) 202 Cal.App.2d 537 (*Peabody*). In *Peabody*, the Court of Appeal determined that subcontractor Peabody was not an indispensable party to a lawsuit determining the existence of a contract to install stadium seating between the general contractor and a competing subcontractor associated with the project bid. If a competing subcontractor had been awarded the bid, it would have hired petitioner Peabody to do some of the work. (*Id*. at pp. 538-540, 545.) The court found that Peabody's interest was only consequential and economic. For purposes of indispensable parties, Peabody had no legal interest in the dispute as Peabody was not a party to the contract at issue. (*Id.*

at pp. 543-544.) In contrast, HRES had already been awarded the CUP that petitioner now wants to invalidate.

Petitioner next claims it was the trial court that should have ordered HRES be joined in the action, citing Code of Civil Procedure section 389, subdivision (a)'s language that the court "shall" order necessary parties to be joined. Petitioner cites no authority that the trial court has a sua sponte obligation to join a party to an action. As Public Resources Code section 21167.6.5 states, it is the petitioner who must name and serve the real party in interest. Similarly, Code of Civil Procedure section 389, subdivision (b) specifically directs the court to dismiss an action for nonjoinder where the party is indispensable. (See *Save Our Bay, supra,* 42 Cal.App.4th at pp. 698-699.) It says nothing about a court ordering a party to be joined on its own motion.

Petitioner also claims the court should have joined HRES at the time of trial because real parties in interest can join an action at any time, even on appeal. As the statute of limitations lapsed early in this case (by August 2017), the court could not compel HRES's joinder at the time of the February 2018 trial under the facts presented. (*Save Our Bay, supra,* 42 Cal.App.4th at p. 699.)[6]

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[6] Petitioner does not suggest when the trial court's "duty" to advise of the existence of an indispensable party arises. We observe the statutes of limitations were short in this case. The CEQA statute of limitations ran on July 6, 2017 (20 days after petitioner served the city with the petition) (Pub. Resources Code, § 21167.6.5, subd. (a)), and the statute of limitations on petitioner's remaining claims ran on August 7, 2017 (90 days after the city issued its decision to grant the CUP) (Gov. Code, § 65009, subd. (c)(1)(E)). Thus, by September 14, 2017, when the

Petitioner contends that the city waived its right to have HRES joined in the action by failing "to bring the joinder issue to the Court's attention other than by raising the issue in its opposition to Petitioner's Opening Brief." This argument incorrectly assumes that the city has the right to waive HRES's right to participate in the action. It does not. We also observe that the city raised the issue of HRES's joinder early in the proceedings—in its September 15, 2017 answer to the petition. The trial court also noted the joinder issue in its September 14, 2017 ruling on petitioner's motion for preliminary injunction.

DISPOSITION

The judgment is affirmed. Defendants and respondents City of Lancaster and City Council of the City of Lancaster are awarded costs on appeal.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.

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trial court denied the preliminary injunction, as the trial court found, it was too late for the court to join HRES.